Supreme Court, U. S.
FILED
AUG 30 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-353

LUIGI GOLDSTEIN, INC.

Petitioner,

v.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari To the United States Court of Claims

ROBERT B. MARCUS
Attorney for Petitioner
1501 Franklin Avenue
Mineola, New York 11501
(212) 343-2277
(516) 741-1710
LAWRENCE K. KATZ
Of Counsel

August 17, 1978

TABLE OF CONTENTS

Page

Opinions Below 2
Jurisdiction 3
Questions Presented 3
Constitutional Provisions Involved 4
Statement of Facts 4
Jurisdiction of the Court Below 5
Reasons for Granting the Writ 5
Conclusion 10
Appendix A (Suspension Order) 11
Appendix B (Order) 14

TABLE OF CASES

Campbell v. Eastland, 307, F 2d 478.....6

Delinger v. Mitchell, 442 F 2d 782 (D.C. Cir)...7

Gordon v F.D.I.C., 427 F 2d 578 (D.C. Cir.).....6

Landes v. North American Co., 299 U.S. 248.....5

Litton Systems v. U.S. Ct. Cl. No. 183-77.....7

McSurely v. McClellan, 426 F 2d 664 (D.C. Cir.).6

Peden v. U.S., 206 Ct. Cl 329, 512, F2d 1099....7

In The

Supreme Court of the United States

October Term, 1978

LUIGI GOLDSTEIN, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari To The United States Court of Claims

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, LUIGI GOLDSTEIN, INC., respectfully prays that a writ of certiorari be issued to review the opinion and orders of the United States Court of Claims rendered in these proceedings respectively on June 2, 1978 and June 30, 1978.

OPINIONS BELOW

1. The opinion of the U.S. Court of Claims Trial Judge Judith Ann Yannello dated June 2, 1978, as yet unreported, appears in Appendix A.

2. The opinion of U.S. Court of Claims Presiding Judge Oscar H. Davis, as yet unreported, dated June 30, 1978, appears in Appendix B.

JURISDICTION

The orders of the U.S. Court of Claims were entered June 2, 1978 and June 30, 1978, respectively. See Appendices A and B. This petition for certiorari was filed less than ninety (90) days from the dates aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

Plaintiff brought action against defendant based on defendant's default in paying money due arising from the Summer Feeding Program for Children. ("The Program"). The Program was administered by defendant pursuant to law and regulations of the Department of Agriculture ("USDA"). Defendant moved for a stay of all proceedings on the grounds that a grand jury empaneled in the Eastern District of New York is investigating the Program and that plaintiff, among others, is a target of said investigation. After the service of an answer by defendant, in which no affirmative defenses were raised, the U.S. Court of Claims issued a stay of all proceedings subject to successive ninety (90) day reports on the status and progress of the grand jury invetigation. The questions thereby raised are:

1. Whether the policy and decisions of the United States Court of Claims cited as authority for the stay substantially vary from the guidelines set by this Court as followed by various U.S. District Courts.

2. Whether the U.S. Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. Whether or not the orders below, based upon the mere allegation by defendant, The United States, that an investigation is proceeding, violates plaintiff's rights to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

4. Whether the delay imposed on plaintiff in recovery of its money constitutes taking of plaintiff's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be...deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

During the year 1975, defendant, through the United States Department of Agriculture, administered a program known as the Summer Feeding Program for Children. Plaintiff participated in that Program as a food vendor. Plaintiff prepared and sold packaged meals to various not-for-profit community service organizations ("Sponsors") who, in turn, contracted with defendant for distribution of the meals to needy children. At the conclusion of the Program, defendant failed to pay its Sponsors who, in turn, defaulted in their obligations to plaintiff. Plaintiff brought actions against the Sponsors and recovered judgments. By levying upon the judgments, plaintiff succeeded to the right, title and interest of the Sponsors to make claim upon defendant. Plaintiff then commenced this proceeding in the U.S. Court of Claims by suing on the contracts between the Sponsors and defendant.

Plaintiff's action was commenced in November, 1977. Thereafter, defendant made a motion for a stay of indefinite duration on the grounds that a grand jury had been empaneled in the Eastern District of New York for the purpose of investigating the Program and that plaintiff and the Sponsors with whom it dealt were targets thereof. No details were cited in defendant's moving papers as to the progress of the investigation, how long the grand jury had been sitting and when its term would be concluded. Defendant was directed to answer the complaint. The answer consists of no more than a general denial. No affirmative defenses are pleaded.

Thereafter, by order dated June 2, 1978, the U.S. Court of Claims granted a stay of all further proceedings pending completion of said grand jury investigation, which order required defendant to file reports of its progress at ninety (90) day intervals.

Thereafter, plaintiff filed a request for review of the Trial Judge's Order. Upon review by a three-judge bench of the United States Court of Claims, plaintiff's request to terminate or modify the Trial Judge's Order was denied, based on a reluctance of the Court to require the government to proceed in civil litigation when related criminal procedures are in progress. The order of the three-judge bench was entered June 30, 1978.

JURISDICTION OF THE COURT BELOW

The basis for Federal jurisdiction in the United States Court of Claims is 28 U.S.C. §1491. This is an action against the United States founded upon contract with the United States.

REASONS FOR GRANTING THE WRIT

I. The decision below directly conflicts with the guidelines laid down by this Court in similar circumstances.

In *Landes v. North American Co., 299 U.S. 248, 255,* Mr. Justice Cardozo, speaking for this Court, prescribed the policy to be followed by Federal courts in dealing with an application for a stay of civil proceedings where other actions are pending involving the same issues, whether they be of an enforcement nature or otherwise, stating:

> "...the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else."

Applying that requirement to a situation in which there is a simultaneous civil action and criminal investigation or prosecution pending, the various district courts and circuit courts of appeal have adopted the position that a stay of indefinite duration in the absence of pressing need is an abuse of discretion. Such stays have not been approved and have been limited to fit the particular situation with which the Court is confronted.

In *McSurely v. McClellen, 426 F. 2d 664 (D.C. Cir.),* the Court found that a stay of indefinite duration in the absence of pressing need was an abuse of discretion. The Court remanded the case to the District Court with the suggestion that after a careful review, the Court limit the stay with respect to discovery only. The Court indicated that there were various possibilities other than a blanket stay of discovery, such as written interrogatories, to be held under seal until taking of evidence in the criminal case is concluded.

In *Gordon v. F.D.I.C., 427 F. 2d 578 (D.C. Cir.),* the Court again held that the overall interest of justice may require that a civil plaintiff should not be delayed, and justice should not be denied, where parallel civil and criminal matters are pending. The Court found it more reasonable to deny a stay and to regulate discovery. The Court suggested that when discovery commences the District Court concern itself with whether the real purpose of the civil discovery is to obtain information not otherwise available in the criminal proceeding or to further a legitimate civil action.

In *Campbell v. Eastland, 307 F. 2d 478, 487,* the Court expounded on the consideration to be given a motion for a stay in such a situation, stating:

> "In some situations, it may be appropriate to stay a civil proceeding...in others it may be preferable for the civil suit to proceed - unstayed. In the proper case, the trial judge should use his discretion to narrow the range of discovery."

In *Delinger v. Mitchell, 442 F. 2d 782, 787 (D.C. Cir.)* commenting upon a stay of all proceedings, the Court stated:

> "The improvidence of the stay granted relates not only to its duration, but to its scope. The order requires the stay of all proceedings. Where related civil and criminal litigations are pending at the same time, sound discretion of the court may require that the civil action not be blocked entirely but be subject to some limitation, including, e.g. protective orders pertinent to discovery, to avoid essential unfairness or other interference with the public interest."

In the case before this Court, no discovery proceedings were initiated prior to the time the stay was granted. No consideration was given to the scope of discovery which plaintiff may seek or how discovery might be supervised to avoid undue prejudice to defendant while allowing plaintiff to proceed with its action to avoid working hardship on plaintiff.

It must be noted that at the present time, some three years after the fact, no indictment has been handed down by the U.S. District Court for the Eastern District of New York. The Court below based its determination on a line of its own decisions which are in substantial conflict with decisions of this and other federal courts. Even the Court of Claims decisions are distinguishable from the case at bar. In both *Litton Systems, Inc. v. United States, Ct. Cl. No. 183-77* and *Peden v. United States, 206 Ct. Cl. 329, 512 F. 2d 1099* indictments had already issued.

It appears the Court below gave no consideration to the fact that this is not a casual action brought by plaintiff for the purpose of discovering facts which might be used in a later criminal proceeding. At issue here is the sum of 1.75 million dollars which the United States owes for food products which were delivered and used. No consideration seems to have been given to the fact that plaintiff as the assembler and preparer of the finished food product has been unable, for the past three years, to pay its suppliers of milk, bread, meat, fruit, paper goods and other products because of defendant's failure

to make payment. No consideration has been given to the fact that not only has plaintiff been driven from business as a result of defendant's default, but that plaintiff's many suppliers are in a moribund state caused by the economic strangulatior resulting from defendant's obduracy.

2. The United States Court of Claims has so far departed from the accepted and usual course of judicial proceedings, that an exercise of this Court's power of supervision is required.

The decisions cited above clearly indicate that the United States Court of Claims has created a body of law in this area which varies from judicial policy followed by the district courts and enunciated by the circuit courts of appeal. This Court's power of supervision should be exercised to make consonant the guidelines to be followed in such matters. Tort actions against the United States are brought in the district courts. Actions against the United States for breach of contract are brought in the United States Court of Claims if the amount in dispute exceeds $10,000.00 It would appear that if in the former case a concurrent criminal proceeding is contemplated, it is unlikely that a blanket stay will issue, while in the latter case, the plaintiff could anticipate a stay. Logic dictates that a litigant be entitled to advance his case to the point of trial and decision regardless whether it is founded in tort or contract. The particular court in which he finds himself should not be the determining factor as to whether or not his case proceeds to trial. Yet, because of the disparity in the way the United States Court of Claims treats this question as compared with the decisions originating in the district courts, that result may come to pass. This Court has the power to direct the United States Court of Claims to be more circumspect in granting stays and to give due consideration to the facts and circumstances of each case.

3. The decision below violates the spirit of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States requires that no person be deprived of property without due process of law. It further assures that private property may not be taken for public use without just compensation. Plaintiff, in this case, has supplied food which was used by the United States Department of Agriculture to advance a program which that Department and the legislative branch of government thought worthy—a program to feed needy children. Plaintiff now seeks to be compensated for that property. True, the said property was not taken by eminent domain, but by the express promise of the government to pay for it. A tribunal, the United States Court of Claims, has been afforded to plaintiff for the purpose of seeking just compensation. That tribunal has now closed the door to plaintiff essentially denying it due process of law by indefinitely forestalling plaintiff's right to trial. The Court is one in which the only defendant is the United States. That same defendant is charged with the responsibility of enforcing Federal criminal laws. However, to give that defendant a weapon by which it may shield itself from civil claims by the mere assertion that it is conducting a criminal investigation is to unduly tip the scales of justice. By issuing a blanket suspension order, the Court has protected the United States beyond the scope of any legitimate need. Without any evidence that there are witnesses who will be inconvenienced, evidence which must be duplicated or facts which must be withheld until the conclusion of the criminal matter, the Court has brought this litigation to a standstill. To allow defendant to exercise such control over litigation against it by raising the specter of investigation without any showing that it is well founded constitutes a violation of the due process requirements of the Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the orders of the United States Court of Claims.

Respectfully submitted,

ROBERT B. MARCUS
Counsel for Petitioner
1501 Franklin Avenue
Mineola, New York 11501
LAWRENCE K. KATZ, Of Counsel

August 17, 1978

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 560-77

(Filed June 2, 1978)

LUIGI GOLDSTEIN, INC.

v.

THE UNITED STATES

TRIAL JUDGE'S ORDER
RE: SUSPENSION OF
PROCEEDINGS

Following the trial judge's Order of April 12, 1978, defendant filed its answer on May 15 and, by letter of May 30, advised that it continued to desire a suspension of proceedings as stated in its motion of February 21.

The defendant has denied plaintiff's allegations that the contracts in issue were performed and that monies are due and owing as a result of this performance. The affidavit of the Assistant United States Attorney submitted by defendant in support of its motion to suspend states that, among the various allegations under investigation by the Grand Jury sitting in the Eastern District of New York, are (1) whether the contracts entered into with the United States were entered into as part of a conspiracy to defraud the government and (2) whether the contracts entered into by plaintiff were part of a conspiracy to defraud.

It appears that the issues being considered by the Grand Jury may, at least to some extent, be coextensive with the issues raised in this case, particularly with respect to the execution and/or performance of the contracts in issue. Proceeding in this case simultaneously with the Grand Jury proceedings would thus appear to be inappropriate.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Defendant's motion to suspend proceedings, filed February 21, 1978, it is hereby granted to the extent that proceedings are suspended except as described in paragraph 2 below.

2. Defendant shall advise the trial judge, at ninety (90) day intervals from the date of this order, as to the status of the Grand Jury proceedings. The first such advice shall include (1) the date upon which the Grand Jury investigation commenced; (2) the length of time during which the present Grand Jury may be empanelled; (3) a description, to the extent possible, of the status of the Grand Jury proceedings; and (4) the length of time anticipated to conclude the investigation. Any subsequent advice, should it be necessary, should include items (3) and (4) above, and any extensions of time regarding item (2).

JUDITH ANN YANNELLO
Trial Judge

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 560-77

LUIGI GOLDSTEIN, INC.	)	Suspension of civil proceedings pending related grand jury investigation.
	)	
v.	)	
	)	
THE UNITED STATES	)	

Robert R. Marcus, attorney of record for plaintiff. Lawrence K. Katz, of counsel.

Thomas W. Petersen, with whom was Assistant Attorney General Barbara Allen Babcock.

Before DAVIS, Judge, Presiding, NICHOLS and KASHIWA, Judges.

ORDER

Plaintiff filed on June 14, 1978, a request for review of the trial judge's order of June 2, 1978, suspending proceedings herein pending completion of an ongoing federal grand jury investigation. Defendant has filed a response opposing plaintiff's request for review.

In the petition herein, filed only on November 21, 1977, the plaintiff, Luigi Goldstein, Inc., alleges that it is the successor in interest to three organizations, Special Programs for Americans, Inc., Nutrition for Youth, Inc., and Bais Zvi of Remsen; that in 1975 each of its predecessors in interest had each entered separate agreements with the Department of Agriculture pursuant to the Special Summer Feeding Program; and that each had fully performed according to its agreement but has not been paid the agreed amount by the

Department of Agriculture. The undenied record herein shows that a special grand jury for the United States District Court for the Eastern District of New York is currently conducting an investigation concerning, *inter alia*, the 1975 Summer Feeding Program. The plaintiff herein and its three predecessors in interest are currently subjects of this grand jury investigation. Among the allegations under investigation by this grand jury are allegations that the agreements between plaintiff's three predecessors in interest and the Department of Agriculture in 1975 were part of a conspiracy to defraud the Government and allegations that food service management companies, including plaintiff herein, obtained contracts, with its three predecessors in interest, in violation of applicable regulations and as a part of a conspiracy to defraud the Governmnet. In view of these facts, it appears that under the circumstances the trial judge's order of June 2, 1978, suspending proceedings herein, subject to periodic reports by defendant every 90 days, is proper. This court is reluctant to require the Government to proceed in civil litigation when related criminal procedures are still in progress. *Litton Systems, Inc.* v. *United States*, Ct. Cl. No. 183-77 (Order of Feb. 3, 1978); *Peden* v. *United States*, 206 Ct. Cl. No. 329, 338-39, 512 F. 2d 1099, 1103-04 (1975). *See also LTV Education Systems, Inc.* v. *United States*, Ct. Cl. No. 108-77 (Trial Judge's order of Nov. 23, 1977). Plaintiff's request to terminate or modify the trial judge's order of June 2, 1978, is hereby denied.

BY THE COURT
Oscar H. Davis
Judge, Presiding

June 30, 1978